IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 59 OF 1995

Subhash Rupachand Shaha ..Appellant

versus

Sou. Shalan P. Patole & Ors. ..Respondents

FIRST APPEAL NO. 60 OF 1995

Subhash Rupachand Shaha ..Appellant

versus

Prandurang R. Patole & Ors. ..Respondents

FIRST APPEAL NO. 61 OF 1995

Subhash Rupachand Shaha ..Appellant

versus

Prandurang R. Patole & Ors. ..Respondents

FIRST APPEAL NO. 62 OF 1995

Subhash Rupachand Shaha ..Appellant

versus

Prandurang R. Patole & Ors. ..Respondents

FIRST APPEAL NO. 63 OF 1995

Subhash Rupachand Shaha ..Appellant

versus

Kum. Vaishali P. Patole & Ors. ..Respondents

Mr. Shekhar Ingawle for the Appellant.
None for the Respondents.

CORAM : D. G. DESHPANDE, J.

DATE : 19TH JANUARY,2005

ORAL ORDER. :

1. All these appeals have been filed by the owner of the truck challenging the Award given by MACT, Kolhapur dated 25.11.1994. In five claim petitions grievance of the appellant - owner of the truck is that the insurance company was exonerated from the liability and the entire liability in all the five Awards was fastened upon him.

2. Accident occurred in the following manner.

. Pandurang Rajaram Patole was the owner of the house i.e. they were residing in a quarter allotted to them by Mahatma Gandhi Vidyalaya, Rukadi, Taluka Hatkanangale. This quarter was situated on the eastern side of Rukadi-Atigre Road. On 17.2.1987 as usual Pandurang and his family members were sleeping in their bedroom. At about 12.30 in the night one truck owned by the Appellant

bearing No.MXL 5369 came from Atigre and dashed heavily against the quarter of the appellant. The said truck was at the relevant time driven by Balasaheb Bapu Hajare, as a result of the dash the entire house collapsed. Pandurang Patole lost his two children in this incident. They died on the spot and Shalan wife of Pandurang sustained injuries as also daughter Vaishali . In this background five claim petitions came to be filed, all of them were allowed to the extent mentioned therein in respective separate orders. However, the insurance company was exonerated and the liability was fastened upon the owner appellant and Balasaheb Bapu Hajare, therfore these Appeals.

3. Counsel for the appellant in all the appeals raised only one common question and since the same question is involved in all these Appeals, I am deciding all the Appeals by this common judgment.

4. The question raised by the counsel for the appellant was that whether the driver had a valid licence or not was a matter to be proved by the insurance company. Insurance company did not adduce any evidence in that regard. Then the driver Balasahb Bapu Hajare did not have any valid driving licence and therefore according to him the defence of the Insurance Company should not be accepted and

they should not have been exonerated. He relied upon the judgment of the Supreme Court reported in Accidents Claim Journal 2004 (Volume I) page 1 National Insurance Company Ltd. vs. Swaran Singh and others. In paragraph 62 of the said judgment it is observed that the Insurance company is required to establish the breach by cogent evidence. In the event Insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The defence of the Insurance company in this case was that the driver did not have a valid driving licence and therefore the appellants had committed breach of policy and has stated that the insurance company was not liable.

5. My attention was drawn by the counsel for the appellant to the evidence of one Nivrutti Ishwara Patil examined on behalf of the Insurance Company. He was a retired PSI and according to him he was working as a Private Investigator and was working in the insurance company - respondent No.2 in these appeals. This witness has stated that he was entrusted with the job to investigate in this matter as to whether Balasaheb Bapu had a valid driving licence. He found out that the charge sheet was filed in the Court of J.M.F.C. against the said

Balasaheb Bapu for driving vehicle without licence under Section 3 read with section 112 of the Motor Vehicles Act. He filed certified copy of the chargesheet Exhibit 67. He made enquiries about the date of birth of Balasaheb Bapu. He obtained the birth certificate from the school which was issued to him and on the date of accident the age of Balasaheb Bapu was eighteen years and six months. He proved the Dakhala i.e. birth certificate issued by the school at Exhibit 69. He further stated that from the RTO office he came to know that no driving licence in respect of the heavy goods vehicle was issued unless person completes 20 years of his age. He therefore concluded that Balasaheb Bapu was driving the vehicle without valid driving licence.

6. This finding was challenged and attacked by the counsel for the appellant, firstly, on the ground that if at all witness Nivrutti was authorised to make investigation by the Insurance company, it was necessary for him to produce on record the said authorisation letter. Admittedly the witness did not produce any Authorisation letter in that regard. Secondly, he did not file any certificate from RTO to the effect that Balasaheb Bapu was not holding any driving licence. He also did not produce the report of the investigation. Counsel for the appellant therefore contended that

in view of these admissions, evidence of Nivrutti has to be taken as a hearsay because he does not get any support to his evidence from any document and therefore according to him if the evidence of this witness Nivrutti is disregarded or disbelieved then there is no evidence on record adduced by the Insurance company to the effect that the driver did not have a valid driving licence on the date of the accident.

7. In the Judgment of the Supreme Court referred to above, in paragraph 63 Supreme Court has clarified that apart from whatsoever is stated in paragraph 62, we do not intend to lay down anything further, i.e. degree of proof which would satisfy the aforementioned requirement in as much as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose different problem which must be resolved having to a large number of factors governing the case including conduct of parties as regard duty to inform, correct disclosure, suppression, fraud on the insurer, etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard and fast rule can therefore be laid down.

If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of contract of insurance on the part of the insured by discharging its burden of proof. The Tribunal, there cannot be any doubt, must arrive at a finding on the basis of the materials available on records."

8. This judgment considered number of aspects of the liability of the insurance company and in paragraph 102 the summary of the findings is given :

> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a socal welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.
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> (ii) Insurer is entitled to raise a defence in a claim petition filed under section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of section 149 (2)(a)(ii) of the said Act.
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> (iii) The breach of policy conditions, e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are

not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companeis are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunal in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under

section 165 read with section 168 is empowered to adjudicate all claims in respect of the accidents involving death or bodily injury or damage to property of third party arising from use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims, inter se, between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub section (7), as interpreted by this court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of the claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable

> the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

If the aforesaid judgment is taken into consideration the position that remains on record is as under :

. The appellant the owner of the vehicle and driver admittedly and obviously was employed by them because there is no other evidence that the driver was carrying on the vehicle without their permission and consent. The driver did not appear before the Tribunal. Nobody was examined also on behalf of the appellant. As against this, insurance company remained contented by examining Nivrutti, Retired Police Officer as a Private Investigator, the evidence has been discussed by me above. If sum and substance of the evidence on record and the aforesaid circumstances are considered than the effect is that there is no proof adduced by the insurance company to come to a definite conclusion that the driver was driving the vehicle without valid licence. The evidence of Private Investigator is of hearsay. He did not file any report, did not make report available to other side. Before

entering into witness box he did not file the authorisation letter issued to him nor any statement on oath was made by the insurance company that they had at any time appointed Nivrutti as private investigator.

9. In these circumstances contention of the appellant is required to be accepted. Filing charge sheet by the police against the said driver for driving vehicle without licence is no proof that the driver had no licence. At any rate insurance company and the witness were accepted to tender the report on record, make its copies available to the other side in advance so that they could cross examine and it was also necessary for the witness to file an authorisation letter on record. Merely because he is examined on behalf of the insurance company, there is no proof that he was duly authorised to conduct enquiry because evidence of such an investigator in the absence of any document is hearsay evidence.

10. In the circumstances the following order is passed :

ORDER

. All the appeals are partly allowed. Order of dismissal of the claim petitions against Insurance Company is set aside and the liability of

payment of compensation fixed upon the present appellant and Balasaheb Bapu driver will be joint and several liability of the appellant, driver and the insurance company. Appeals allowed to that extent only. If the appellant has already paid the full compensation to the claimants they will be at liberty to recover it from the insurance company with interest at the rate of 9% interest per annum from the date of payment of compensation by the appellant to the claimants.

19/1/2005 (D. G. DESHPANDE, J.)